Supreme Court, U.S.
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No. 93-292

In The

Supreme Court of the United States

October Term, 1993

MARK H. FOGEL, JEM MANAGEMENT ASSOCIATES CORP., FREDERICK M. MINTZ and JUDITH REAUME,

Petitioners,

vs.

ALLEN KOPELSON, HERBERT H. LEVESS and ALEX ZUPNICK,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether there is any reason for this Court to exercise its discretionary authority to review the decision of the Court of Appeals for the Second Circuit holding that the petitioners, as non-settling defendants, had no standing to appeal from a district court order approving a proposed partial settlement.

2. Whether the other issues sought to be raised by petitioners herein would properly be before this Court, where such issues were neither raised below nor adjudicated by the court of appeals.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER-STATEMENT OF THE CASE

The petition seeks review of a decision of the United States Court of Appeals for the Second Circuit dismissing for lack of standing a purported appeal by non-settling defendants from a final order of the district court approving a partial settlement of a class action brought under the federal securities laws, the Racketeering Influenced and Corrupt Organizations Act (RICO) and state common law.

This action was commenced on behalf of investors in a limited partnership known as Thompson Parking Partners, Limited Partnership III which was syndicated by the individual defendants Mark H. Fogel, Frederick Mintz and Judith Reaume through a corporate entity known as Jem Management Associates Corp. The amended complaint alleges that the partnership was formed for the ostensible purpose of purchasing a leasehold interest in a public parking garage and thereafter operating that garage for a profit. It further alleges that the offering materials prepared and disseminated by the defendants to sell limited partnership interests to investors were false and misleading in that they failed to disclose, among other things, that of a total offering of $2.25 million which was purportedly to be used to purchase the leasehold, $850,000 – more than one-third of the purchase price – was paid as a kickback to or for the benefit of the non-settling defendants. As the petitioners' themselves so aptly put it in their brief below: "The bottom line of this

litigation is that the purchasers of the limited partnerships were defrauded by the Appellants of the purchase price of the limited partnerships." (Petitioners' brief in the court of appeals at 2)

After the commencement of this action, a separate action was commenced (the *"Sperber Adams action"*) seeking, *inter alia*, the appointment of a receiver of the leasehold for the Thompson Street garage which is the subject of this action as well as that of another garage located on East 79th Street which had been leased by a second limited partnership subsequently syndicated by these same defendants.

In August 1991, based upon information revealed at a hearing held in the *Sperber Adams* action, plaintiffs in this action filed an amended complaint asserting additional claims, including the claim under RICO, and adding additional defendants, including defendant Stanley Muss.[1] Thereafter, discussions ensued with counsel for Muss concerning a possible settlement of plaintiffs' claims against him. Those negotiations were successful in producing the partial settlement, which was thereafter submitted to the district court for approval.

The settlement provided that defendant Muss would pay to the plaintiff class members in this case the sum of

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[1] Upon disclosure of the apparent hidden kickbacks at the hearing before District Judge John S. Martin, he promptly referred the matter to the office of the United States Attorney for investigation. As a result of such information, defendants Fogel, Reaume and Muss were recently indicted by a New York County Grand Jury for, *inter alia*, grand larceny, criminal possession of stolen property, and scheme to defraud.

$490,000, nearly one-quarter of the total investment of $2,250,000 made by class members, and an additional $360,000 to the plaintiffs in the *Sperber Adams* action. The settlement also provided that a final order was to be entered as a judgment pursuant to Rule 54(b), in order to permit the funds to be distributed immediately to the members of the class, while at the same time allowing counsel to continue to prosecute the action against the remaining defendants.[2]

On June 26, 1992, the district court held a hearing concerning the proposed settlement. No member of the class objected to the settlement. Prior to the hearing, the petitioners submitted a letter dated June 22, 1992, containing certain purported objections to the proposed settlements. The only objection raised by the non-settling defendants at the hearing was to the provision in the *Sperber Adams* settlement which called for the relinquishment of the leasehold interest in the 79th Street Garage to defendant Muss, who is the fee owner.

In response to that letter, plaintiffs' counsel pointed out to the Court that all class members had been advised in writing of that provision and none had objected to it. Moreover, it was also indicated that the limited partnership had long been in default in its payment of rent and that in a state court eviction action for non-payment of rent which had been commenced by Muss as fee owner, Jem Management, the non-settling corporate defendant,

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[2] In fact, this money has already been paid and is now in an escrow account awaiting distribution to the class members pending the disposition of this petition.

had failed to interpose any defense. See petition, Appendix B at 18a. Furthermore, the court-appointed receiver for the 79th Street garage advised the court at the hearing that the partnership had no funds with which to cure the default in the payment of rent. The petitioners never requested any hearing other than that held on June 26, 1992.

On July 1, 1992, the district court approved the settlement with defendant Muss in this case, as well as in the *Sperber Adams* case, and the orders appealed from were entered. Each of the orders specifically provides that:

> 3. This Court hereby approves in its entirety the Agreement, the Settlement set forth therein and the transactions contemplated thereby, and finds and concludes that the Agreement, the Settlement and the transactions contemplated thereby, are in all respects fair, just, reasonable, adequate and in the best interests of the Class, and each of the members of the Class, and this Court therefore directs the Plaintiffs, the Class and the Settling Defendant to comply with the terms of the Agreement and the Settlement set forth therein and to carry out the transactions contemplated thereby.
>
> 4. The Court further finds that the Agreement, the Settlement set forth therein and the transactions contemplated thereby are the product of good faith, arm's-length negotiations between the parties to the Agreement.

Petitioners thereafter sought to appeal from the order approving the settlement based on two grounds: first, that the order was improper by virtue of Rule 54(b); and second, that the district court failed to adequately set forth the basis for approving the settlement. Although

their brief made passing mention of the leasehold interest in the 79th Street Garage, it did so only in a footnote, and raised no constitutional argument based thereon.[3]

In response, plaintiffs argued that petitioners had no standing to appeal from the district court order, and that in any event their arguments seeking to frustrate the proposed settlement were without merit. In a unanimous decision, the circuit court dismissed the appeal for lack of standing, and thus had no reason to, and did not, consider any other issue. Petitioners now seek a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

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PETITIONERS HAVE SHOWN NO REASON FOR THIS COURT TO GRANT REVIEW OF THE ORDER OF THE CIRCUIT COURT.

As set forth in Rule 10 of the Rules of this Court, a review on writ of certiorari is not a matter of right, but of

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[3] The only mention of the 79th Street garage was contained in footnote 6 to petitioners' brief in which they argued:

> "The fact that the settlement disposes of property which is not within the power of the settling parties to entirely dispose of and the fact that the transfer of such property is central to the settlement suggests the possibility of collusion which should have been addressed by the District Court. The District Court, on the troubling issue of transfer of the garage property, is silent."

This footnote plainly makes no reference to any alleged constitutional infirmity, such as petitioners now claim.

judicial discretion. Such review will be exercised only "when there are special and important reasons therefor." As set forth in Rule 10.1, among the reasons which might warrant the exercise of the Court's discretion are:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) when a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.[4]

As will be shown below, the issues petitioners purport to raise do not even arguably come within the guidelines set forth by Rule 10 as reasons for review by this Court.

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[4] Rule 10.2(b) concerns only decisions by a state court, and is therefore not applicable to this case.

A. THE CIRCUIT COURT CORRECTLY HELD THAT, AS NON-SETTLING DEFENDANTS, PETITIONERS LACKED STANDING TO APPEAL FROM THE DISTRICT COURT ORDER APPROVING THE SETTLEMENT.

The circuit court properly held that non-settling defendants such as petitioners, whose rights are not affected by a settlement, had no standing to appeal. Although any member of a class who appears in response to a notice given pursuant to Rule 23(e) and objects to the proposed settlement may appeal from a final judgment approving the settlement, a non-settling defendant in a class action normally does not have the right to appeal from the approval of a settlement. *Waller v. Financial Corp. of America*, 828 F.2d 579, 582-83 (9th Cir. 1987); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1232-33 (7th Cir. 1983); *In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11, 14 (1st Cir. 1980), *cert. denied sub nom. Arthur Anderson & Co. v. Stewart*, 449 U.S. 826; *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 172 (5th Cir. 1979), *cert. denied*, 452 U.S. 905. As stated in 3B *Moore's Federal Practice* ¶ 23.80[5] (2d ed. 1992) at 498-99:

> A co-defendant has no standing to appeal from a consent decree that binds him in no way and does not affect his legal rights.

See also, *Utility Contractors Ass'n of N.J., Inc. v. Toops*, 507 F.2d 83 (3d Cir. 1974). Indeed, petitioners themselves admit that absent a showing of "plain legal prejudice", a non-settling defendant may not object to a court order approving a settlement. Petition at 14.

Petitioners did not and could not make any showing of any such "plain legal prejudice"; on the contrary, as the

circuit court properly held, their legal rights have been unaffected by the partial settlement, and therefore they had no standing to appeal from the order. See petition, Appendix B at 9a.

Petitioners fail to show that their rights have been in any way affected by the settlement, let alone that there has been any violation of the constitutional protection of the Fifth Amendment. Their purported constitutional argument is solely based on the claim that, as "general partners and shareholders in the limited partnership", they had some theoretical property interest in the leasehold in the 79th Street Garage, and that such property was taken without due process of law. Petition at 19-20. The claim is frivolous.[5]

As the court of appeals properly held, the district court order did not extinguish any property rights of petitioners, because they had none. It was undisputed below that at the time the receiver was appointed for the 79th Street garage, the limited partnership had for months been in default in its obligations to pay rent and make other mandatory payments. It was also undisputed that in a pending eviction proceeding based upon such default, the managing general partner, one of the petitioners here and a non-settling defendant, had asserted no defense. Moreover, that petitioner, Mark Fogel, testified, under oath, that the garage was operating at a loss

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[5] As indicated above, the argument concerning the 79th Street Garage was contained only in a footnote in their brief to the Court of Appeals, and nowhere have they ever previously claimed that the issue was one of constitutional proportions.

and that the partnership had no funds with which to cure the default.

In addition, at the hearing on the proposed settlement before the district court, the receiver reported to the district judge that the 79th Street garage was not a viable entity because the rent obligation under the lease alone exceeded the monthly income. He further stated that the leasehold was of no value to the partnership.

Based upon this evidence, both the district court and the court of appeals properly concluded that the non-settling defendants had already forfeited their interest in the leasehold by virtue of the uncured, and indeed incurable, defaults in its rent and tax obligations. See petition, Appendix B at 19a.

Petitioners' arguments seeking review by this Court are wholly specious. They claim, for example, that since Muss – who was the fee owner of the garage – desired the return of the property to which he was entitled, the garage "must have *some* monetary value." (petition at 15) The obvious answer to that argument is that merely because the property may have had value to its owner in no way proves that it had any monetary value to the lessee which was legally in default and unable to meet its obligations under its lease.

Petitioners also claim a constitutional violation because they were not given an evidentiary hearing concerning the value of the 79th Street garage. However, they never requested such an evidentiary hearing, and, even now, they make no showing that such an evidentiary hearing would have in any way altered the district court's decision to approve the partial settlement.

Instead, unable to allege any substantive arguments, petitioners rely solely on vague allegations, based on speculation, conjecture, and surmise. Such unsubstantiated allegations are wholly insufficient to warrant granting certiorari by this Court.

B. THE PURPORTED ERROR IN THE RULE 54(b) CERTIFICATION AND THE ALLEGED LACK OF FAIRNESS OF THE SETTLEMENT ARE NOT REVIEWABLE BY THIS COURT BECAUSE THEY WERE NEITHER RAISED IN NOR RULED ON BY THE COURTS BELOW.

Petitioners' other two purported reasons why this Court should grant certiorari are: (1) the anomalous claim that the circuit court lacked jurisdiction to hear their own appeal from the district court's order because the district court did not properly certify the order as final pursuant to F.R.C.P. 54(b); and (2) the claim that, in some unspecified fashion, the district court abused its discretion in approving the settlement. Neither of these issues, however, would properly be before this Court because petitioners never raised them in the district court and the circuit court never ruled on them.

As indicated above, petitioners' only ground for opposing the proposed settlement order in the district court was the provision that the fee interest in the 79th Street garage was to be returned to defendant Muss, the owner. Petitioners never mentioned any objection to the Rule 54(b) certification contained in the proposed order.

And, as for the district court's purported abuse of discretion in approving the settlement, petitioners not

only failed to raise this issue below, but their own counsel conceded at the hearing before the district court that, as non-settling defendants, they had no standing to object to the reasonableness of the settlement. Petitioners' counsel also conceded that the final order contained nothing which would affect any direct claims that they may have against defendant Muss.[6]

Accordingly, even if this Court were to grant certiorari, these issues would not properly be subject to review by this Court.

C. IN ANY EVENT, THE DISTRICT COURT'S RULE 54(b) CERTIFICATION WAS COMPLETELY PROPER.

Petitioners' argument concerning Rule 54(b) is substantively without merit because the reasons for certifying the order were obvious and abundant, and petitioners were in no way prejudiced by the court's action. Their purported objection to the Rule 54(b) certification was and is nothing more than a transparent attempt to prevent the distribution of the settlement funds to the class members. No useful purpose would have been served by requiring the settlement funds to be held in escrow until the conclusion of the entire case, which petitioners no doubt hope will be years away; it would merely serve to inflict further injury on the investors, many of whom

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[6] Although petitioners did seek to raise these arguments for the first time in their brief to the court of appeals, that court had no need to and did not consider them because their appeal was dismissed for lack of standing.

invested essential savings or pension funds expecting a steady flow of income and who instead lost their entire investment.

In addition, petitioners fail to show that the Rule 54(b) certification was in fact improper. They merely argue only that the district court failed to set forth its reasons for certifying the order. The short answer to that contention is that the district court had no reason to do so, because neither appellants nor anyone else objected to the certification, and its benefit both to the members of the plaintiff class and to the settling defendant was patently obvious. By certifying the order as a final judgment, the court enabled the plaintiff class to receive the settlement funds immediately and the settling defendant to know that all claims of the plaintiff class asserted against him had been finally dismissed and that he no longer had to bear the burden of defending against those claims.

Finally, but perhaps most importantly, petitioners have nowhere even suggested how they have been prejudiced by the Rule 54(b) certification.

Contrary to appellants' assertion, the failure of the district court to set forth its reasons for a Rule 54(b) certification does not require dismissal of an appeal. See, *6 Moore's Federal Practice* ¶ 54.41[1] (1992-93 Cum. Supp.) at 43 (" . . . The Second Circuit has stated that where no reasons for certification were given, but such reasons are obvious or abundant, the court of appeals will accept jurisdiction of the appeal."); *St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc.*, 884 F.2d 688 (2d Cir. 1989); *Fletcher v. Marino*, 882 F.2d 605 (2d Cir. 1989) ("Where the reasons for the entry of judgment are obvious . . . , a District

Court's entry of judgment pursuant to Rule 54(b) will satisfy the purposes of the Rule even though the court did not state the reasons for its determination that judgment should be entered"); *Perez v. Ortiz*, 849 F.2d 793, 796-97 (2d Cir. 1988); *Pension Benefit Guar. Corp. v. LTV Corp.*, 875 F.2d 1008 (2d Cir. 1989), *reversed on other grounds*, 110 S.Ct. 2668 (1990).

Thus, the certification under Rule 54(b) raises no issue warranting the granting of certiorari by this Court.

D. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN APPROVING THE PARTIAL SETTLEMENT.

Finally, petitioners' only other purported reason for granting certiorari, the claim that, for some unspecified reason, the district court erred in approving the settlement, is patently frivolous.

Petitioners themselves acknowledge that the approval of a settlement by the district court may only be reversed upon a showing that the court abused its discretion. Their own petition cites the Fifth Circuit's decision in *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5th Cir. 1980), which held that the determination that a settlement is fair, adequate and reasonable:

> . . . is left to the sound discretion of the trial court and we will not overturn that court's decision absent a clear showing of abuse of that discretion [citations omitted]. In addition, our judgment is informed by the strong judicial policy favoring settlements. . . .

This same standard, as petitioners themselves also concede, has been adopted by the Second Circuit. See, *In re Boesky Securities Litigation*, 948 F.2d 1358, 1367-68 (2d Cir. 1991). *See also, Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986)

Far from raising any issue warranting review by this Court, petitioners fail to point to any factor or evidence that even suggests that the district court abused its discretion in approving the settlement. On the contrary, their only argument seems to be that this Court should grant certiorari merely because the district court did not adequately set forth the reasons for its finding that the settlement was fair, adequate and reasonable.

Such a technical defect, even if true, would hardly warrant granting certiorari. Here again, however, there was no defect, for the simple reason that no person with standing to do so raised any objection to the fairness of the settlement.[7] Petitioners cannot, by raising technical procedural issues, do indirectly what they cannot do directly. See, *In re Beef Industry Antitrust Litigation, supra,* at 172.

Moreover, the district court properly found that the settlement was fair, just, adequate and reasonable. As set forth in the affidavits submitted to the district court, the settlement with defendant Muss was the result of arm's length negotiations between experienced counsel. Among other criteria that the courts consider in evaluating the

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[7] As noted above, petitioners' counsel conceded at the hearing that petitioners had no standing to object to the amount of the settlement.

fairness of a proposed class action settlement are the risks of establishing liability and damages, the range of reasonableness of the settlement in light of the best possible recovery and all attendant risks of litigation, the stage of the proceedings, the risks of pursuing the action through trial, and the reaction of the class to the settlement. See, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980); 3B *Moore's Federal Practice*, ¶ 23.80[4] at 485-496. On the basis of these factors, there is no question that the court properly found that the settlement was fair, reasonable and adequate.

The settlement avoided protracted and costly litigation with defendant Muss. There was no doubt that in the absence of a settlement, defendant Muss could have been expected to assert a variety of legal and factual defenses to the allegations in the complaint, and that the outcome of any trial of this action as against him would be uncertain. As a result, plaintiffs' ability to establish liability against Muss was far from certain, and by virtue of the settlement, the class plaintiffs will receive a substantial reimbursement for their losses, while the case continues against the remaining defendants.

Therefore, the district court properly exercised its discretion in approving the settlement, and the circuit court properly dismissed petitioners' purported appeal therefrom for lack of standing.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

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